STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

BEFORE THE COURT-APPOINTED REFEREE IN THE LIQUIDATION OF THE HOME INSURANCE COMPANY DISPUTED CLAIMS DOCKET

In Re Liquidator Number:	2005-HICIL-14
Proof of Claim Number:	AMBC465096
	AMBC464386
	INTL277878
	AMBC465074
Claimant Name:	Century Indemnity Company
Claim:	Kentile Floors, Inc.

INTERVENOR METEX MFG. CORPORATION'S OBJECTION TO CENTURY INDEMNITY COMPANY'S SET OFF CLAIM

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Intervenor Metex Mfg. Corporation ("Metex"),[1] through its undersigned counsel, hereby submits this objection to the Century Indemnity Company ("CIC") claim against The Home Insurance Company in Liquidation ("Home"). Specifically, Metex objects to the set-off of amounts that CIC claims it paid for defense and indemnity for asbestos claims asserted against Kentile Floors, Inc. ("Kentile") (the "Asbestos Claims"). Metex supports the position of the Liquidator of Home (the "Liquidator") that this claim should be disallowed.

INTRODUCTION

CIC asserts that it is entitled to set off amounts that it purportedly paid "on behalf of" Home for the Asbestos Claims on a dollar-for-dollar basis against other amounts, unrelated to the Asbestos Claims, that CIC owes to Home ("CIC's Claim"). The Liquidator has disallowed CIC's Claim, and CIC objects to that disallowance. Metex, as intervenor, submits this brief to support the Liquidator's disallowance of CIC's Claim, and to set forth Metex's position with respect to CIC's Claim, including how allowance of CIC's Claim will adversely affect Metex and the claimants in the Asbestos Claims.

As fully set forth in the Liquidator's Section 15 Submission (the "Liquidator's Submission") and in the Liquidator's Sur-Reply Brief, CIC's Claim should be denied because, among other things, it is now indisputable that CIC has not shown that it has paid more than its "fair share" of the Asbestos Claims, a threshold showing for any contribution claim. The entire layer of excess insurance in which CIC's policies reside, including the five Home policies at issue in this matter (the "Umbrella Layer"), has effectively been exhausted either through

[1] In 1992, Kentile Floors, Inc. ("Kentile") filed a petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. In 1998, Kentile confirmed a plan of reorganization in its Chapter 11 case. Metex emerged from the Chapter 11 bankruptcy proceedings of Kentile as the "Reorganized Debtor." On November 7, 2012, Metex filed a petition under Chapter 11 of the Bankruptcy Code (the "Bankruptcy Proceedings") in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").

payment of Asbestos Claims, or through settlement agreements to pay out the limits of those policies upon approval by the Bankruptcy Court. Thus, CIC's own "fair share" of payments for the Asbestos Claims, like the amounts paid or agreed to be paid by every other insurance company sharing the Umbrella Layer with CIC, equals the entire policy limits of CIC's policies. Therefore, CIC has not paid more than its "fair share," a threshold showing for any equitable contribution claim, and any amounts that it may have paid "on behalf of Home" are simply counted towards and included within CIC's payment of its policy limits, which constitute its fair share. Because CIC has no valid contribution claim against Home, it has no basis for a set-off claim against the Liquidator in this matter.

Importantly, if CIC's Claim is allowed, it will have the effect of reducing the limits payable from the Home estate for payment of defense and indemnity of Asbestos Claims, thus reducing the funds available to asbestos claimants through the Asbestos Claims trust fund that is being created as part of Metex's Chapter 11 reorganization. Allowing CIC's Claim thus would violate the general principle that disputes among co-insurers as to their relative obligations under insurance policies covering a mutual insured should not affect the insured's rights under the policies. Similarly, an insurance company has no right to subrogation (which CIC incorrectly claims here against Home) unless the policyholder first has been "made whole" with respect to the claim at issue. It is indisputable that the totality of the available insurance is insufficient to make Metex, and through Metex, the asbestos claimants, whole for the Asbestos Claims. Therefore, pursuant to principles of fairness and equity, and in accordance with applicable law, CIC has no valid contribution claim, and thus has no basis for a set-off claim against Home. CIC's Claim was properly denied by the liquidator which denial should be upheld in this matter.

BACKGROUND FACTS

A. The Insurance Policies

As set forth in detail in the Liquidator's briefing, Kentile manufactured vinyl floor tiles from 1906 to approximately 1992. In the Asbestos Claims, Kentile has been sued by thousands of claimants who each allege that they have been injured by exposure to asbestos allegedly contained in Kentile products. From at least the early 1960's until 1985, Kentile purchased primary, umbrella and excess insurance policies, which cover product liability claims, including the Asbestos Claims.

From 1992 until approximately 2003, certain primary insurers paid 100% of Kentile's defense and indemnity costs for the Asbestos Claims. In or about 2003, these primary insurers, refused to continue funding Kentile's defense, claiming that the primary policies were exhausted. During the period between 2003, when the primary insurers stopped paying Kentile's defense, and January 1, 2009, Kentile's umbrella or excess insurance companies, including CIC, took over the defense and settlement of the Asbestos Claims. In January 2009, Liberty Mutual Insurance Company ("Liberty Mutual"), Kentile's sole remaining unexhausted primary insurance company, was ordered, by the New York State court handling the coverage litigation, to pay all defense costs going forward, but the excess insurers, including CIC, continued, for a brief period, to make some indemnity payments under their excess policies.

CIC sold Kentile two first layer excess policies, No. XBC 1710, covering the period from 1965-1968, and XBC 41938, covering the period from 1968-1971. These policies provide $5 million in limits for each year of the six years of coverage for a total of $30 million. Home sold Kentile five first-layer excess policies for the years 1977 through 1981. Liquidator's Submission at 5. Each Home policy has a limit of $5 million, including both indemnity and defense. Id. All of these excess policies are in the same Umbrella Layer.

CIC asserts that it made payments on behalf of Home under its policies. Id. at 10. CIC asserts that it has paid a total of $5,492,033.86 on Home's behalf, and seeks a setoff of an unrelated debt that it owes to Home's estate in that amount. Of the amount sought by CIC in its set off claim, $3,110,539.31 is for indemnity, and $2,381,494.55 is for defense paid due to Home's insolvency. Id. at 17.

B. Exhaustion of Coverage

1. Primary Coverage

Set forth in the Liquidator's Submission, at 5, is a chart of all of Kentile's coverage for the period from January 1, 1970 to January 1, 1985. As discussed in the Liquidator's Submission, Metex asserted, in the coverage litigation pending in the New York State Court, that the Liberty Mutual primary policies covering the period from 1970-1971 had no aggregate limits, and paid defense costs outside of limits, and thus that the Liberty Mutual policies are unexhausted. Liquidator's Submission at 9-10. That issue remains in dispute. Metex, however, has reached a settlement with Liberty Mutual which will exhaust the limits of the Liberty Mutual policy. For purposes of this submission, therefore, the Liberty Mutual limits are exhausted. All other primary insurers asserted that their policies were exhausted as of June 2003, and Metex did not dispute that exhaustion. Liquidator Submission at 6.

2. Umbrella Layer Coverage (Including CIC)

As of mid-2011, the Umbrella Layer insurers other than CIC and Home that had issued first layer excess policies to Kentile had asserted that their policies were exhausted. Id. CIC claims that the limits of Policy No. XBC 1710 have been eroded by payments of both defense and indemnity, and that the limits of Policy No. XBC 41938 have been eroded by payment of indemnity only (that is, payments of defense under XBC 41938 were in addition to limits). See Century Indemnity Company's Initial Pre-Hearing Brief in Support of its Setoff Claim Involving

Kentile Floors ("CIC's Opening Brief") at 11. CIC asserts that the $15 million of total limits under policy XBC 41938 are exhausted. CIC also asserts that it has paid $14.3 million under policy XBC 1710, leaving approximately $690,000 of the $15 million in policy limits remaining. Id. at 7. In addition, as explained in the Liquidator's Sur-Reply at 2, CIC has already agreed to enter into an agreement with Metex whereby CIC agrees to pay $12 million, which is essentially its remaining policy limits: the $690,000 remaining under policy XBC 1710, and the limits of two higher level policies. CIC's settlement also agrees to release all claims, including those of Metex, under the CIC policies, which are "null and void and of no further force or effect and any and all coverage otherwise available under the Insurance Policies is completely and totally bought back and exhausted." Id. Accordingly, there is no doubt whatsoever that all of CIC's policy limits will be exhausted by the Asbestos Claims.

3. The Home Coverage

The Liquidator, the New York Litigation Bureau, and Metex have entered into an agreement to settle Metex's Asbestos Claims under the Home policies for a payment of the remaining policy limits of approximately $10 million, less the final amount of the CIC Claim that is at issue here, with such payment to be made to the asbestos trust being created in the ongoing Metex Bankruptcy Proceedings for the benefit of asbestos claimants. *See* Motion For Approval of Settlement annexed to the accompanying Certification of Paul E. Breene, Esq. as Exhibit A. Accordingly, there is no question that the Home limits will be exhausted. The only question is whether Metex, and thus the trust on behalf of the asbestos claimants, will receive the full remaining $10 million in limits, or whether the amount available to pay Asbestos Claims will be reduced by any set-off against unrelated amounts owed to Home by CIC.

In its Disclosure Statement in the Bankruptcy Proceedings, Metex has asserted that remaining coverage "will not be sufficient to satisfy in full the pending and future Asbestos PI Claims asserted against Kentile." Liquidator Sur-Reply at 2.

ARGUMENT

I. BECAUSE CIC CANNOT SHOW THAT IT HAS PAID MORE THAN ITS "FAIR SHARE" OF THE ASBESTOS CLAIMS, IT HAS NO CONTRIBUTION CLAIM AGAINST HOME AND THUS NO BASIS FOR SET-OFF.

As discussed above, it is beyond dispute, and not mere speculation, that CIC's limits will be exhausted by payment of Asbestos Claims, as will the remaining limits of the Home policies. Under black letter contribution law, as a threshold matter for asserting a contribution claim, CIC must demonstrate that it paid more than its fair share of the Asbestos Claims and that Home was enriched by these payments. See Md. Cas. Co. v. W.R. Grace & Co., 218 F.3d 204, 212 (2d Cir. 2000) (holding that "whatever contribution rights exist do so because an insurer that insures a common risk with other carriers can demonstrate that it paid more than its fair share of the relevant costs.") (emphasis added). Accord Nat'l Cas. Co. v. Vigilant Ins. Co., 466 F.Supp.2d 533, 540 (S.D.N.Y. 2006) (noting that "New York law recognizes a cause of action for pro rata contribution when a co-insurer pays more than its fair share for a loss covered by multiple insurers."). See also EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's, 156 N.H. 333, 338 (N.H. 2007); Lockwood v. Dickey, 83 N.H. 365, 368-69 (N.H. 1928) (holding that "[c]ontribution is usually regarded as an equitable right rather than as arising from an implied contract . . . The thing that gives rise to the right of contribution is that one of the common obligors has discharged more than his fair equitable share of the common liability.") (emphasis added) (internal quotations omitted); Robert Anderson et al., Apportionment and Contribution Between Insurers, 44 Am. Jur.2d Ins. § 1768 (West 2014) ("An insurer can recover

equitable contribution only when that insurer has paid more than its fair share. If a plaintiff insurer has not paid more than its fair share, it cannot recover equitable contribution even against an insurer who has paid nothing.").

CIC's "fair share" of the Asbestos Claims is its total limit of liability under its policies. CIC has not shown, because it cannot show, that it has or will pay more than that amount as a result of any purported payments on behalf of Home. Thus, under both New York and New Hampshire law, CIC has no basis for a contribution claim against Home. In order to reduce its debt to Home through a set-off, Home must have a valid debt to CIC.. Because CIC has not paid more than its fair share of the Asbestos Claims, and because Home will pay its entire limits for the Asbestos Claims, Home has no valid debt to CIC. CIC thus has no claim to set off. On this basis, CIC's Claim should be denied.

II. EQUITY DICTATES THAT CIC'S CLAIM SHOULD BE DENIED BECAUSE HOME WILL NOT BE UNJUSTLY ENRICHED BY CIC'S PAYMENTS.

As explained in the Liquidator's Submission, at 13-14, CIC's claim is based on "equitable" contribution: "whatever obligations or rights to contribution may exist between two or more insurers of the same event flow from equitable principles." W.R. Grace, 218 F.3d at 211. See also Lockwood, 83 N.H. at 368-69 ("Contribution is usually regarded as an equitable right rather than as arising from an implied contract . . . The thing that gives rise to the right of contribution is that one of the common obligors has discharged more than his fair equitable share of the common liability.") (internal quotations omitted). Significantly, "equitable contribution is a right that can be affected by events that post-date the payments if they bear upon fairness and equity." W.R. Grace, 218 F.3d at 212. Here, in order to do equity, it is necessary to look at the totality of facts as they exist today, not when CIC's payments were made.

The W.R. Grace court specified that the controlling equitable principle with respect to contribution claims is whether the party from whom contribution is sought has been unjustly enriched at the expense of another:

> The controlling inquiry under an equitable analysis is whether one party is unjustly enriched at the expense of another—the law abhors unjust enrichment. Here there was no enrichment of the policyholder, nor any collusion between the late settlers and Grace, nor any benefit other than the indemnification and defense of potentially covered claims. The notion of unjust enrichment applies where there is no contract between the parties, as in the case of the parties to this appeal, and where the party sought to be charged for contribution, has money which it should not retain, but should under equitable principles turn over to another.

218 F.3d at 212. It is now clear that Home will **not** be unjustly enriched at the expense of CIC. Home will ultimately pay its full limits to Metex pursuant to the settlement agreement with Metex, and Home's obligations were in no way reduced by CIC's payments. In addition, CIC will pay no more than its full limits, which it would have been obligated to pay even if Home had been solvent and paid its obligations up front. The only thing that happened here is that, at the time of payment, CIC designated some of the payments it made, either to defend or indemnify Metex with respect to Asbestos Claims, as having been made on behalf of Home to cover Home's allocated share of those defense and indemnity costs. Contrary to CIC's assertions in its submissions, however, this did not impose an additional cost on CIC (not even the time value of money), nor did it give Home any advantage through delaying its payment for the Asbestos Claims. As CIC made each payment "on behalf of" Home, it claimed a set-off against the amounts it owed Home on an unrelated liability. Had CIC not claimed a set-off, it would have had to make those unrelated payments to Home at that time. Likewise, had CIC not claimed those set-offs, Home would have received payments which it did not receive. Looking at the transactions as a whole, the advantages to either party based on the amounts and even the timing of the payments is a wash.

Indeed, if CIC's Claim were allowed, CIC would be unjustly enriched at the expense of the asbestos claimants. CIC's liability to Home will be reduced by the amount of the payments CIC asserts it made on behalf of Home, even though CIC would have had to pay that amount under its policies without regard to Home's insolvency. Home's payment to the trust fund for the asbestos claimants would thus be reduced by that amount. CIC would have substantially more money in its pockets, and the asbestos claimants would have substantially less.

III. CONTRIBUTION OR SUBROGATION CLAIMS SHOULD NOT REDUCE KENTILE'S, OR THE ASBESTOS CLAIMANTS' RECOVERY UNDER THE KENTILE POLICIES.

It is a general principle of insurance law that disputes between and among co-insurers as to their relative responsibilities under insurance policies covering the same insured, either pursuant to "other insurance" clauses, or pursuant to equitable contribution claims, as is the case here, should not affect the insured's recovery under those policies:

> [A]pportionment among multiple insurers must be distinguished from apportionment between an insurer and its insured. When multiple policies are triggered on a single claim, the insurers' liability is apportioned pursuant to the "other insurance" clauses of the policies or under the equitable doctrine of contribution. That apportionment, however, has no bearing upon the insurers' obligations to the policyholder. A pro rata allocation among insurers "does not reduce their respective obligations to their insured." The insurers' contractual obligation to the policyholder is to cover the full extent of the policyholder's liability (up to the policy limits).

Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co., 52 Cal. Rptr. 2d 690 (Cal. Ct. App. 1996) (citations omitted) (emphasis added). Here, allowing CIC's Claim will have a direct adverse impact on Metex's recovery, and thus on the amount of money available to asbestos claimants. Each dollar of CIC's Claim that is allowed will reduce the payment to Metex, and thus to the asbestos claimants, by a dollar.[2]

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[2] This is a critical distinction between Liberty Mutual's "contribution claim" and CIC's contribution claim. The New York Liquidation Bureau's payment of Liberty Mutual's contribution claim did not reduce the total

IV. CIC MAY NOT PROPERLY ASSERT A SUBROGATION CLAIM AGAINST HOME, IN PART BECAUSE METEX HAS NOT BEEN MADE WHOLE.

CIC has asserted that it is entitled to assert a subrogation claim against Home. See CIC's Brief at 23 n.6. As set forth in the Liquidator's Brief, at 14 n. 12, however, CIC has no right of subrogation here because insurance company subrogation claims generally may only be asserted against third-party wrongdoers, not against co-insurers. See W.R. Grace, 218 F.3d at 211 (co-insurers cannot recover from one another on a subrogation theory because they "are not seeking reimbursement from a third-party wrongdoer."); see also Vigilant Ins. Co. v. Employers Ins. of Wausau, 626 F. Supp. 262, 268 (S.D.N.Y. 1986) (rejecting argument that insurer becomes subrogee of insured when co-insurer improperly disclaims coverage and explaining that contribution claim governed dispute between both co-insurers); Am. Dredging Co. v. Fed. Ins. Co., 309 F. Supp. 425, 428 (S.D.N.Y. 1970) (explaining that co-insurer cannot recover against other co-insurers based on subrogation principle because "[t]he only right which [plaintiff co-insurer] has against the co-insurers in [sic] by way of pro rata contribution.").

Even if CIC could potentially assert a subrogation claim against a co-insurer, however, it could not do so here because it is prohibited from doing so by the "made whole" doctrine, whereby an insurance company may assert a subrogation claim only when the insured has been "made whole" for the claim at issue:

> Under the made whole doctrine, the insurer has no right to reimbursement until the insured's entire loss has been paid, even if the insurer is liable for only part of the loss and pays its entire obligation. An insurer cannot recoup any part of this loss while the insured is less than whole.

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payments available to asbestos claimants. Liberty Mutual made payments on behalf of Home pursuant to an agreement with the New York Liquidation Bureau, with the prior understanding that Bureau would reimburse Liberty Mutual later for those payments.

Allan D. Windt, Insurance Claims & Disputes, § 10.06 (1982). See, e.g., ELRAC, Inc. v. Ward, 748 N.E.2d 1, 8 (N.Y. 2001) (noting that "[i]f . . . an insured is driving a car and is hit and injured by another driver, the insured may file a claim with her insurer. The insurer then has the right, under the common law of subrogation, to 'stand in the shoes' of the insured and seek recompense from the third-party tortfeasor for the amount paid to the insured, provided that the insured has been made whole") (citing N. Star Reinsurance Corp. v. Cont'l Ins. Co., 624 N.E.2d 647 (N.Y. 1993); 16 Couch, Insurance 3d, ch. 223). See also USF&G v. Maggiore, 749 N.Y.S.2d 555 (N.Y. App. Div. 2002).

As has been demonstrated above, the total liability for the Asbestos Claims is projected to exceed the total limits of liability of all available insurance, and thus Metex (and through Metex the asbestos claimants) will not be made whole. CIC thus clearly cannot have any subrogation rights against Home even if its subrogation theory were correct, which it is not.

CONCLUSION

For all the reasons set forth above, the Liquidator's rejection of CIC's Claim should be affirmed and CIC's Claim should be denied.

Dated: January 27, 2014

Respectfully Submitted,

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STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

BEFORE THE COURT-APPOINTED REFEREE IN THE LIQUIDATION OF THE HOME INSURANCE COMPANY DISPUTED CLAIMS DOCKET

CENTURY INDEMNITY COMPANY, Claimant, v. ROGER A. SEVIGNY, INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, AS LIQUIDATOR OF THE HOME INSURANCE COMPANY, Respondent.	Proceeding No. 2005-HICIL-14

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I, Steven J. Lauwers, hereby certify that on this 27th day of January, 2014, I have provided a copy of the foregoing document electronically to the parties on this Service List.

Steven J. Lauwers